

Mr. Fortnica



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southern California Roofing Company

File: B-236631

Date: December 26, 1989

DIGEST

1. Conversation between bidder and agency project director concerning solicitation specifications, where bidder was told by project director that he was without authority to grant bidder permission to deviate from solicitation specifications but that bidder could attempt to get specifications changed after award was not an improper "secret" grant of permission to deviate from specifications.
2. Bid is responsive where as submitted it is an offer to perform without exception the exact thing called for in the solicitation and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions of the solicitation.
3. A protester has no standing to claim an error in a competitor's bid, since it is the responsibility of the contracting parties--the government and low bidder--to assert rights and bring forth the necessary evidence to resolve mistake questions.
4. Where an agency makes the determination that award must be made notwithstanding pending protest because of urgent and compelling circumstances significantly affecting the United States, submission by protester filed within 10 days of agency's determination which essentially reiterates initial protest will not be considered a new post-award protest requiring agency to direct contractor to cease performance or make another determination.
5. Where an agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for a decision by the General Accounting Office (GAO) on a bid protest, and notifies GAO prior to making award, the agency has complied with the Competition in Contracting Act of 1984 (CICA). Further, GAO does not review the agency's determination.

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DECISION

Southern California Roofing Company protests the award of a contract to Saddleback Roofing, Inc., under invitation for bids (IFB) No. GS-09P-89-KTC-0027, issued by the General Services Administration (GSA) for the replacement of the roof on the Federal Building in Los Angeles, California.^{1/}

We deny the protest in part and dismiss it in part.

The solicitation provides, in relevant part, that in performing the contract the successful bidder must install two layers of roof insulation board.

Southern California's protest seems to be centered on its position that Saddleback's bid should be rejected as nonresponsive because it is allegedly based on the installation of a less expensive single layer of roof insulation board rather than the two layers of insulation board as specified. The protester does not point to anything on the face of Saddleback's bid which is inconsistent with the IFB, but instead contends that sometime prior to bid opening a Saddleback representative had obtained the agency's "secret" oral permission to install a less expensive single layer of roof insulation board. According to the protester, this "secret" agreement allowed Saddleback to underbid it.

The record shows that sometime during the procurement process a representative of a firm, presumably Saddleback, contacted the agency project director responsible for the roofing project. The project director reports that the representative asked whether the agency would accept a single layer of roof insulation board rather than the two layers specified in the solicitation. According to the project director's affidavit, he advised the representative that the use of a single layer of insulation board could be suggested after award during the shop drawing submittal phase of the contract, but he cautioned that the contracting officer would then have to examine the proposal and determine whether the use of a single layer of board would

^{1/} Southern California, the third low bidder, also protested the potential award of the contract to the Bryant Organization, Inc., the initial low bidder. However, since Bryant declined to extend its bid acceptance period, it is now ineligible for award. Southern California's protest concerning Bryant is thus academic and need not be considered. See A&C Bldg. and Indus. Maintenance Corp., B-229931, Mar. 25, 1988, 88-1 CPD ¶ 309.

be acceptable. The project director states that he emphasized during this conversation that he could not and would not give pre-award approval of the use of a single layer of roof insulation board.

According to other affidavits submitted by the agency, at no time during the procurement process were any other agency officials involved in this procurement contacted by bidder representatives regarding the IFB roof insulation specifications. Therefore, we assume that the conversation between the agency project director and the bidder representative constituted the protester's alleged "secret" discussions.

The record does not support the protester's view that an agency official gave Saddleback's representative permission to deviate from the solicitation specifications in either its bid or during performance. The record shows that the bidder was merely advised that the project director did not have the authority to amend the specifications, would not amend the specifications, and that if selected the bidder could inquire during the shop drawing phase of the contract as to whether a single layer of roof insulation board would be an acceptable alternative. We see nothing improper in this conversation.

Furthermore, there is nothing in Saddleback's bid that takes exception to any of the requirements of the IFB. Specifically, Saddleback's bid does not in any way take exception to the specifications requiring the installation of two layers of roof insulation board. The test applied in determining responsiveness is whether the bid as submitted is an offer to perform without exception the exact thing called for in the solicitation and upon acceptance will bind the contractor to perform in accordance with all of the material terms and conditions of the solicitation. Bryant Org., Inc., B-228204.2, Jan. 7, 1988, 88-1 CPD ¶ 10. As Saddleback has offered to perform in accordance with the solicitation without exception, its bid is responsive and the acceptance of its bid obligated Saddleback to install two layers of roof insulation board as required by the solicitation. Id.

The protester argues that Saddleback submitted such a low bid that it must have been mistakenly based on the planned installation of a single layer of roof insulation board. The protester argues that based on Saddleback's earlier inquiry concerning the use of single board insulation the agency should have been aware that its bid was mistakenly based on the type insulation and was therefore required to reject the bid.

Since, as we indicated earlier there was nothing on the face of Saddleback's bid that was inconsistent with the solicitation requirements, the agency had no basis upon which to reject it. As to whether the bid was based on a mistake, the protester has no standing to claim an error in a competitor's bid since it is the responsibility of the contracting parties, here the agency and Saddleback, to assert rights and bring forth the necessary evidence to resolve mistake questions. Esilux Corp., B-234689, June 8, 1989, 89-1 CPD ¶ 538.

Southern California next contends that Saddleback's extension of its bid acceptance period as requested by the GSA during the pendency of this protest is defective for lack of a properly authorized extension letter. Saddleback's bid extension was prepared on Saddleback's letterhead, and signed by its division director. As such, we see nothing wrong with it.

During our consideration of the protest, GSA informed us that it awarded the contract to Saddleback notwithstanding the protest based on its determination that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for a decision on this protest. See 31 U.S.C. § 3553(d)(2)(A)-(ii) (Supp. IV 1986).

Shortly after this, Southern California submitted to our Office what it termed a "post-award protest," demanding that GSA suspend performance of the Saddleback contract. The remainder of this submission essentially reiterates Southern's initial protest, with the exception of two additional arguments that: (1) Saddleback's bid price is ambiguous, and (2) GSA's determination to proceed with award and performance of the contract notwithstanding the protest was improper.

CICA requires an agency to withhold award of a contract when it receives notice of a protest from this Office prior to award, and to suspend contract performance if the agency receives notice of a protest from this Office within 10 days of the date of award. 31 U.S.C. § 3553(c)(1) and (d)(1) (Supp. IV 1986). The Act also provides that an agency which receives notice of the protest prior to award may authorize the award of the contract while the protest is pending upon a written finding that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for our decision on the protest, and notifies our Office of that finding. 31 U.S.C. § 3553(c)(2)(A) and (B). Additionally, in a post-award protest the agency may authorize performance of the contract

notwithstanding the protest upon a written finding that performance of the contract is in the best interest of the United States, or that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for our decision on the protest, and notifies our Office of that finding. 31 U.S.C. § 3553(d)(2)(A) and (B).

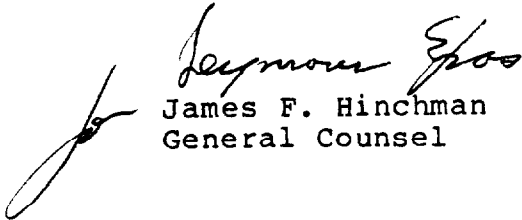
Through its submission of what it terms a "post-award protest," which as explained below includes no new timely protestable issues, Southern California seeks to nullify the effect of the agency's determination to go forward with the award. Since the agency has already made the required determination to go forward with award in the face of Southern California's pre-award protest it need not go through the same process to continue performance in the face of Southern California post-award "protest."

The first argument raised in Southern California's "post-award" protest, that Saddleback's bid is ambiguous, is untimely and we will therefore not consider it on the merits. Our Bid Protest Regulations require that protests other than those based on solicitation improprieties must be filed within 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1989). On receipt of the agency report dated September 25, which included a copy of the Saddleback bid, Southern California was informed that the agency disagreed with its contentions regarding Saddleback's bid, and that the agency intended to make award to Saddleback. Southern California, however, did not complain that Saddleback's bid was allegedly ambiguous until October 25, nearly 1 month after it received the agency report. As Southern knew or should have known as of its receipt of the agency report that the agency intended to make award to Saddleback, but did not argue that Saddleback's bid was ambiguous until 1 month later, its protest on this issue is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

Southern California finally argues that the agency's determination to award the contract to Saddleback notwithstanding the protest was improper because, in fact, urgent and compelling circumstances did not exist and because the agency failed to notify our Office of the award, as required. 31 U.S.C. § 3553(c)(1) and (c)(2)(B). First, our Office does not review an agency's determination of urgent and compelling circumstances. The Taylor Group, B-234294, May 9, 1989, 89-1 CPD ¶ 436. Second, despite

Southern's contention to the contrary, this Office was properly notified of GSA's determination to make award notwithstanding the protest.

Accordingly, the protest is denied in part and dismissed in part.



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General Counsel